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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 223

VIRGINIA S. BLOCK,

Petitioner,

v.

LOUIS T. BLOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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INDEX

Brief

	PAGE
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	5
United States	5
Statement of Case	5
How Federal Question Is Presented	7
Reasons for Granting Writ	9
Conclusions	16

Appendix

A. Memorandum Opinion of Trial Court, Court of Common Pleas, Hamilton County, Ohio	1a
B. Judgment Entry, Court of Common Pleas, Hamilton County, Ohio	5a
C. Opinion, Court of Appeals, Hamilton County, Ohio	7a
D. Judgment of Affirmance, Court of Appeals, Hamilton County, Ohio	8a
E. Opinion, Supreme Court of Ohio	9a

Citations

Cases:

Barber v. Barber, 323 U. S. 77	9
Block v. Block, 196 F.2d 930, CCA-7, 1952	7
Boring v. Ott, 138 Wis. 260, 119 N. W. 865, 1909	12

PAGE

Cohen v. Randall, 137 F.2d 441, CCA-2, 1943, cert. denied 320 U. S. 796 ..... 4, 10, 12, 13

Cole v. Cunningham, 133 U. S. 107, p. 111-112 ..... 5, 10

Glover v. Glover, ... Utah ..., 242 P.2d 298, 1952 12

Graver v. Faurot, 162 U. S. 435 3

Griffith v. Bank of New York, 147 F.2d 899, cert. denied 325 U. S. 874 ..... 4, 9, 13

Griswold v. Griswold, 111 Ill. App. 263, 1903 15

Hafner v. Hafner, 237 Minn. 424, 54 N. W. 2d 854, 1953 13

Halvey v. Halvey, 330 U. S. 610 ..... 5, 14

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238 ..... 2, 3, 10

Indiana ex rel. Anderson v. Brand, 303 U. S. 95 9

International Steel & Iron Co. v. National Surety Co., 297 U. S. 657 9

Johnson v. Johnson, ... Minn. ..., 68 N. W. 2d 398 .. 13

McDaniel v. Traylor, 196 U. S. 415, 424 ..... 3, 10

Marshall v. Holmes, 141 U. S. 589 ..... 2, 3, 11, 13

Milekovich v. Quinn, 40 Cal. A. 537, 181 P. 256, 1916 .. 12

Morris v. Jones, 329 U. S. 545 ..... 4, 5

Publiker v. Shallcross, 106 F.2d 949, 951, CCA-3, 1939. 4

Sapp v. Superior Court, 119 Cal. A.2d 64, 260 P.2d 119, 1953 12

Scott v. Dilks, 47 Cal. A.2d 207, 117 P.2d 700, 1941 12

Simon v. Southern Ry., 236 U. S. 115, 122 ..... 3, 10

Smith v. Foto, 285 Mich. 361, 280 N. W. 790, 1938 12

Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 1923 12

United States v. Throckmorton, 98 U. S. 61 ..... 3, 9, 11, 12

PAGE

United States Nat. Bank of Denver v. Bartges, 120 Colo. 317, 210 P.2d 600, cert. denied 338 U. S. 955 ..... 4, 10, 12, 13

Weber v. Weber, 260 Wis. 420, 51 N. W. 2d 18, 1952 .. 13

Williams v. North Carolina, 325 U. S. 226 13

Statutes

U. S. Code

Title 28, Sec. 1257 (3) 2

Title 28, Sec. 1738 ..... 2, 5

U. S. Constitution, Art. IV, Sec. I 2, 5, 7

Other Authorities:

21 Columbia Law Review 268-70 11

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Virginia S. Block, prays that a Writ of Certiorari issue to review the order and judgment entered in the above-entitled case by the Supreme Court of Ohio on April 13, 1955.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 163 Ohio St. 230 (advance sheets, Ohio Bar, issue of April 25, 1955). The opinion of the Court of Appeals is not reported, but is attached hereto as an appendix. The memorandum opinion of the Court of Common Pleas of Hamilton County, Ohio, not reported, and its judgment entry, are attached hereto in the appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on April 13, 1955. The jurisdiction of this Court is invoked under the provisions of *28 U. S. Code, Section 1257 (3)*. The Courts of Ohio misapplied the provisions of *Section I, Article IV*, of the Constitution of the United States, and *28 U. S. Code, Section 1738*, refusing to modify the decree of the Cook County Circuit Court of the State of Illinois, which had awarded petitioner a divorce and adopted a settlement agreement executed by the parties, even though recognizing that a manifest fraud had been perpetrated upon petitioner by respondent. The Ohio Courts below held that the full faith and credit clause of the United States Constitution precluded them from modifying the Illinois decree for any fraud other than fraud going to the jurisdiction over the parties or the subject matter. Petitioner states that this holding is contrary to the principle announced in *Marshall* v. *Holmes*, 141 U. S. 589, and *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238. Petitioner states that by reason of this erroneous application of the full faith and credit clause of the United States Constitution, a clear constitutional question is presented under *28 U. S. Code, Section 1257(3)*.

QUESTIONS PRESENTED

1. The main question presented is whether an Ohio Court of general jurisdiction, sitting as a court of equity, is precluded by the full faith and credit clause of the United States Constitution from modifying a property settlement agreement approved by an Illinois divorce decree, where such settlement was procured by respondent's fraud in misrepresenting and concealing his assets.

The Ohio Courts held that under *Article IV, Section I* of the Constitution of the United States, they were compelled to give full faith and credit to the Illinois decree,

although the facts (which were admitted, for all purposes in this action) set forth a manifestly unconscionable fraud upon petitioner in the misrepresentation and concealment by respondent of his true worth prior to and during the execution of the property settlement agreement. If the Ohio decision is permitted to stand, then one spouse, by fleeing the state which rendered the divorce decree and by avoiding subsequent service therein, could prevent any court in the country from relieving the innocent party from the effect of an unconscionable fraud.

It is the contention of the Petitioner that the full faith and credit provisions were never intended, and never have been interpreted by this Court to preclude the modification of a decree or judgment of a sister state when such decree or judgment was procured by fraud of the type here present.

The decisions of the Ohio Courts in this cause are in complete conflict with the decisions of the United States Supreme Court in *McDaniel v. Traylor,* 196 U. S. 415, 424, and *Simon* v. *Southern Ry.,* 236 U. S. 115, 122; and are contrary to the equitable principles announced and reiterated by this court in *United States* v. *Throckmorton,* 98 U. S. 61, *Marshall* v. *Holmes,* 141 U. S. 589, and *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U. S. 238; and are clearly erroneous.

2. Also involved in this problem is the question of the present state of the equitable doctrine of avoidance of judgments by reason of fraud. Since the conflicting opinions in *United States* v. *Throckmorton,* 98 U. S. 61, and *Marshall* v. *Holmes,* 141 U. S. 589, courts throughout the United States have been at a loss as to the equitable rule governing the power of one court to avoid judgments and decrees of another court because of extrinsic or intrinsic fraud. This is illustrated by the attempt of the Court of Appeals for the 7th Circuit to certify in *Graver* v. *Faurot,*

162 U. S. 435. See, *Publicker* v. *Shallcross,* 106 F.2d 949, 951, CCA-3, 1939. As a result of this absence of a clear rule, the supposed "key" words *"extrinsic"* and *"intrinsic"* have lost all logical meaning; and in divorce actions, particularly, we are faced with lower court decisions variously describing as "extrinsic" or "intrinsic," *identical* facts of misrepresentation and concealment of assets during settlement negotiations. It is earnestly urged, therefore, that the rule should be clarified and definitively announced by this Court, in order to bring such confusion to an end.

3. While this Court has established, as an exception to the full faith and credit rule, the general equitable doctrine of relieving an injured party from the consequences of a judgment or decree procured through manifest fraud, the Supreme Court of the United States has never passed on the precise factual situation here presented, although the opportunity to have the question decided has been sought. *Cohen* v. *Randall,* 137 F.2d 441, cert. denied, 320 U. S. 796; *Griffith* v. *Bank of New York,* 147 F.2d 899, cert. denied, 325 U. S. 874; *United States Nat. Bank of Denver* v. *Bartges,* 120 Colo. 317, 210 P.2d 600, cert. denied, 338 U. S. 955.

It is earnestly submitted that an interpretation of the full faith and credit clause, as applied to these facts, is badly needed. Accordingly, a decision to the effect that "full faith and credit" does not apply to a settlement agreement procured by unconscionable fraud and incorporated in a divorce decree, would be of lasting benefit.

4. Lastly, it is obvious from the record that the Ohio courts misunderstood the operation of the full faith and credit clause, by not according the Illinois decree only that degree of faith and credit which would have been accorded the decree in Illinois, if under attack there. The Ohio courts did not even consider what Illinois would have done

under the circumstances, although under Illinois law such an attack would be permitted. The result was to accord the Illinois decree *greater* faith and credit than it would have been given in Illinois itself. Such rulings obviously were erroneous in the light of the positive pronouncements of this Court in *Cole* v. *Cunningham*, 133 U. S. 107, at pp. 111-112, *Morris* v. *Jones*, 329 U. S. 545, and *Halvey* v. *Halvey*, 330 U. S. 610.

STATUTES INVOLVED

UNITED STATES

The first section of *Article IV* of the Constitution of the United States is primarily involved:

> "Section 1. Full Faith and Credit.—Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The statute implementing such section is found in *28 U. S. Code, Section 1738:*

> "The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. . . ."
>
> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF CASE

Virginia S. Block and Louis T. Block were married in Chicago, Illinois, on February 21, 1941. Friction developed

between the Blocks in the fall of 1945. During the property settlement negotiations prior to the institution of divorce proceedings, Mr. Block and his attorneys disclosed to Mrs. Block and her attorneys that substantially all his assets, to-wit: $970,000.00, had been placed in an irrevocable trust in Cincinnati, Ohio, in October, 1945, with the trust income of $25,000.00 per annum for life payable to Mr. Block, and on his death the corpus to go to a charitable foundation founded by his father. This trust was represented to be valid in all respects, and entered into bona fide solely for the purpose of assuring Mr. Block a risk-free income.

Mr. Block offered to pay Mrs. Block the sum of $110,000.00 in full settlement of all her claims to alimony and maintenance; and, relying upon the representations made as to the validity of the trust, and that the corpus of the trust was not available for settlement purposes, Mrs. Block accepted this offer on February 27, 1946. Mrs. Block had meanwhile on February 19, 1946, filed her Complaint for Divorce in Cook County, Illinois. On February 28, 1946, Mr. Block filed his appearance and answer in said cause, and on March 12, 1946, a decree for divorce was entered, embodying the property settlement.

Thereafter on January 24, 1950, Mr. Block filed his Petition in Hamilton County, Ohio, against the trustee of his "irrevocable" trust, alleging that said trust had been entered into because of the undue influence of his father, and praying that said trust be held void. The Court found, from the evidence offered by Mr. Block and his father, that there was indeed undue influence, and ordered a reconveyance by the Trustee to Mr. Block.

On April 13, 1951, upon discovery of the decree setting aside the trust, Mrs. Block filed her Complaint in the nature of a Bill of Review in the Superior Court of Cook County, Illinois, attempting service by publication on Mr. Block, and alleging that this trust had been created during their

marriage solely in order to create a fictitious straitened financial condition for Mr. Block, and thus to enable him to obtain an unconscionable advantage in dealing with Mrs. Block in the property settlement negotiations; that Mr. Block knew of the undue influence and coercion of his father from the date he signed the trust, and had been advised by his attorney that the "irrevocable" trust could be set aside at any time on this ground, yet had not advised Mrs. Block of this fact, but, on the contrary, *had represented that the trust was bona fide.* That because of this fraud, the divorce decree should be reformed to provide her with the equitable rights as to alimony and maintenance from the corpus which had been reconveyed to Mr. Block.

This cause was removed by Mr. Block to the United States District Court, Chicago, Illinois, because of diversity of citizenship, Mr. Block being a resident of Cincinnati, Ohio, and then dismissed (in the absence of personal service) for want of jurisdiction of his person. The dismissal was affirmed by the U. S. Court of Appeals. *Block* v. *Block,* 196 F.2d 930, CCA-7, 1952.

Subsequently, on November 12, 1952, Mrs. Block filed an action in equity in the Court of Common Pleas, Hamilton County, Ohio, embodying the above allegations, and secured personal service on Mr. Block.

HOW FEDERAL QUESTION IS PRESENTED

At the close of petitioner's opening statement in the Court of Common Pleas, Hamilton County, Ohio, respondent moved the court for judgment on the pleadings and opening statement, on the ground that under *Article IV, Section I* of the Constitution, the Court was required to give full faith and credit to the Illinois divorce decree and was powerless to render the relief sought, even though the

allegations of fraud in the procurement of said decree be admitted. Four additional grounds for said motion also were advanced. The trial court sustained the motion solely on the ground of full faith and credit, overruled the motion on the other four grounds, and dismissed the cause. The judgment entry read:

> "ON CONSIDERATION WHEREOF, the court finds that in the judgment entered in the Superior Court of Cook County, Illinois, General No. 46S3509, on or about March 12, 1946, in a suit instituted by the plaintiff against defendant, said court had jurisdiction over the parties and the subject matter of said action, and therefore is entitled to full faith and credit in the courts of this state under the provisions of Article IV, Section I of the Constitution of the United States, and Title 28, U. S. C. A., Section 1738, the Act of Congress implementing said Article and Section, and that this Court is without power to reform said decree, for which relief the amended petition prayed."
>
> "The Court further finds that the other grounds of said motion for judgment on the pleadings and on the opening statement are not well taken and to that extent said motion is overruled." (Appendix B, p. 6a.)

On appeal to the Court of Appeals (First Appellate District, State of Ohio), the dismissal on the ground of full faith and credit was assigned as error by Petitioner. Judgment was affirmed, the court holding:

> ". . . On consideration whereof the Court find there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant." (Appendix C, p. 8a.)

An appeal as a matter of right, based upon the Constitutional question of full faith and credit, was thereupon taken to the Supreme Court of Ohio, and a motion to certify filed on the ground of public and great general inter-

est. The Supreme Court dismissed the appeal as a matter of right, holding:

> "It is ordered and adjudged that this appeal as a matter of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved." (Appendix E, p. 10a.)

The Court overruled the motion to certify.

It is clear from the record in this case that the Ohio Courts deemed the federal question to be before them, and actually entertained and decided the cause on that ground alone. The various non-federal grounds put forward by respondent were not decided against petitioner. Under the circumstances it is clear that there is but one question before this Court: the federal question of the proper interpretation of the full faith and credit clause. *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657. The sufficiency of the lower courts' ground for granting full faith and credit to a sister state decree is one for this Court to determine. *Barber* v. *Barber*, 323 U. S. 77.

REASONS FOR GRANTING THE WRIT

1. The decision of the Trial Court in the instant case, as affirmed by the Court of Appeals and Supreme Court of Ohio without opinion, was based upon the theory that:

> ". . . an existing final judgment and decree of a court of one state cannot be attacked on the ground of fraud in the courts of any other state unless it can be shown that jurisdiction over one of the parties or over the subject matter of the action was obtained by fraud."
>
> "In this case the Illinois Court admittedly had full jurisdiction over the parties and the subject of the action and to grant the relief prayed for would be to

substantially impair the validity of the Illinois decree and would violate the full faith and credit clause of the federal constitution." (Appendix A, p. 4a.)

The principle thus announced is in conflict with the decisions of this Court in *Cole* v. *Cunningham,* 133 U. S. 107, 112, where the Court announced the rule to be:

> "This (the full faith and credit clause) does not prevent an inquiry into the jurisdiction of the Court, in which a judgment is rendered, to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject, nor whether the judgment is founded in, and impeachable for, a manifest fraud."

and *Simon* v. *Southern Railway,* 236 U. S. 115, where the Court said at p. 122:

> "For even where there has been process and service, if the Court 'finds that the parties have been guilty of fraud in obtaining a judgment . . . it will deprive them of the benefit of it.' *McDaniel* v. *Traylor,* 196 U. S. 415, 423."

The decisions of the Ohio Courts in the instant case further are contrary to the equitable principles announced in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U. S. 238, where Mr. Justice Black's opinion (at p. 244) states:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after discovered fraud, relief will be granted against judgments regardless of the term of their entry. *Marine Insurance Co.* v. *Hodgson,* 7 Cranch 332; *Marshall* v. *Holmes,* 141 U. S. 589. . . . Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious

> in exercising their power over such judgments. *United States* v. *Throckmorton,* 98 U. S. 61. But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' *Pickford* v. *Talbott,* 225 U. S. 651, 657, they have wielded the power without hesitation."

2. The error into which the Ohio Courts have fallen in this case is symptomatic of the confusion which exists throughout the United States in the application of equitable rules to attacks upon judgments and decrees because of after-discovered fraud. Because of the conflict between the severe test for fraud set forth in *United States* v. *Throckmorton,* 98 U. S. 61, 65, and the more liberal interpretation given in *Marshall* v. *Holmes,* 141 U. S. 589, the various state and federal courts have selected one or the other of the two rules as suited their own philosophy:

> "As for the federal rule itself, it must still remain unsettled. Since the courts are at liberty to cite either line of authorities, and do so as suits their convenience, the only possible answer in spite of repeated assertions that the federal rule is clear, is that there is no federal rule at all. And there will be none until one or the other of the conflicting decisions is overruled."
>
> 21 *Columbia Law Review,* 268-270, as cited in *Publiker* v. *Shallcross,* 106 F.2d 949, CCA-3, 1939.

See also, *Griffith* v. *Bank of New York,* 147 F.2d 899, CCA-2, 1945, at p. 901.

The fraud in the instant case lay in respondent having induced Petitioner to enter into a property settlement agreement by means of false and fraudulent representations as to the control of the property he owned, thus causing her to believe he was unable to respond to her rights in his property to a degree commensurate with his actual wealth; that she did not learn of the falsity of these statements until after the divorce decree had been entered,

and the so-called "irrevocable" trust had been set aside; and that, had she known the truth at the time she executed the property settlement agreement, she would not have accepted its terms.

This factual situation has been before the various state and lower federal courts on innumerable occasions, with irreconcilable diversity of results. Many courts attempt to fit these facts into the "extrinsic"-"intrinsic" rule set down in *United States* v. *Throckmorton,* 98 U. S. 61, the majority of such courts holding that this *does* constitute extrinsic fraud sufficient to sustain an independent attack on the decree (even though the original court had jurisdiction of the person and subject matter). Representative of these cases are: *Taylor* v. *Taylor,* 192 Cal. 71, 218 P. 756, 1923; *Smith* v. *Foto,* 285 Mich. 361, 280 N. W. 790, 1938; *United States Nat. Bank of Denver* v. *Bartges,* 120 Colo. 317, 210 P.2d 600, cert. denied, 338 U. S. 955, sub. op. 224 P.2d 658, pet. for cert. dismissed, 340 U. S. 957; *Milekovich* v. *Quinn,* 40 Cal. App. 537, 181 P. 256, 1916; *Sapp* v. *Superior Court,* 119 Cal. A.2d 64, 260 P.2d 119, 1953.

Another line of cases holds that because of such extrinsic fraud, the original court was *deprived* of jurisdiction over the subject matter of the action and that the judgment or decree was consequently vulnerable on jurisdictional grounds: *Scott* v. *Dilks,* 47 Cal. A.2d 207, 117 P.2d 700, 1944, *Glover* v. *Glover,* ... Utah ..., 242 P.2d 298, 1952.

Still another rule applies in New York, where the New York Courts apparently have decided that the extrinsic fraud must encompass *coercion* and *duress* before relief can be granted; *Cohen* v. *Randall,* 137 F.2d 441, CCA-2, 1943.

Wisconsin and Minnesota, on the other hand, have rejected the "extrinsic-intrinsic" rule entirely (See *Boring* v. *Ott,* 138 Wis. 260, 119 N. W. 865, 1909, and *Hafner* v.

Hafner, 237 Minn. 424, 54 N. W. 2d 854); and have broadened the rule to conform more readily to *Marshall* v. *Holmes,* 141 U. S. 61, stating that equity will remedy a fraud consisting even of intrinsic perjury in the action. See also: *Weber* v. *Weber,* 260 Wis. 420, 51 N. W. 2d 18, 1952, and *Johnson* v. *Johnson,* ... Minn. ..., 68 N. W. 2d 398, 1955.

Judged by the confusion which currently exists among the various states, it is apparent that a defrauded wife can hope only that her fleeing spouse comes to rest in a jurisdiction such as Wisconsin, Minnesota or California—and not New York, nor Ohio—if she is to succeed in unmasking the fraud perpetrated against her in the original divorce action.

This Court has gone far in attempting to bring some measure of order into the chaotic conditions which currently plague all phases of the interstate divorce problem. *Williams* v. *North Carolina,* 325 U. S. 226. Settlement of the question here presented plainly is in the public interest, and is properly a matter upon which this Court should act as final arbiter.

3. The exact factual situation presented in the instant case has never been passed upon by this Court, although such a determination, in cases in which there was a close similarity in facts, has been sought without result:

Griffith v. *Bank of New York,* 147 F.2d 899, C. C. A. 2, cert. denied, 325 U. S. 874.
United States Nat. Bank of Denver v. *Bartges,* 120 Colo. 317, 210 P.2d 600, cert. denied, 338 U. S. 955.
Cohen v. *Randall,* 137 F.2d 441, C. C. A. 2, cert. denied, 320 U. S. 796.

To complicate the situation further, the first two cases established the right to the equitable relief sought, while the last denied it.

In the interest of establishing a more consistent approach to the question of avoidance of divorce decrees incorporating settlement agreements procured by fraud, and to render the full faith and credit clause intelligible when applied to such factual situations, the Court should take this opportunity to decide a case which embodies the very question (unencumbered by extraneous issues), heretofore involved in the dozens of cases which have arisen throughout the country in recent years.

A decision by this Court that misrepresentation and concealment of assets by one spouse which induce the other to enter into an inequitable property settlement agreement, is fraud sufficient to empower a court of equity to interpose its will upon the parties; and that in such situations, the court of equity is not required to give full faith and credit to the original divorce decree, embodying said agreement, would be in accord with prior decisions of this Court, and would remove the distressing uncertainties and conflicts into which lower courts have fallen.

4. A further error of the Ohio Courts which is apparent in this case, and one in which many other courts in the various states have fallen, relative to this issue of the proper application of the full faith and credit clause, was a disregard of the positive pronouncement of this Court in *Halvey* v. *Halvey,* 330 U. S. 610, 1946, where this Court stated:

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the Decree, New York may. . . . But a judgment has no constitutional claim to more conclusive or final effect in the State of the forum than it had in the state where rendered. . . . 'Whatever may be the authority of a State to undermine a judgment of a sister state on grounds not cognizable in the state where judgment was rendered (Cf. *Williams* v. *No. Carolina,* 325, 226, 230) it is clear that the state of the forum has at least

> as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered.' "

The Ohio Court disregarded what Illinois had decided would be done under the factual situation presented in the instant case, and contented itself with a recitation of equitable rules which it felt should govern the case. This oversight did not stem from any lack of authority in Illinois on the point, since the Court's attention had been called to the one case decided on this issue in Illinois, namely, *Griswold* v. *Griswold,* 111 Ill. App. 263, 1903, where the Illinois rule was announced to be:

> "Where the consent of the wife, to an amount to be decreed to her as alimony, is coercively obtained by the husband, and through his falsehoods and fraudulent misrepresentations and concealment as to his financial worth and his ability to provide for her, and a decree on consent, so obtained, is entered, there is fraud in the procuring of the decree, and a court of equity has inherent jurisdiction to purge the decree of such fraud and enter a decree awarding to the wife such alimony, as 'from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just.' "
>
> "The decree under all the circumstances was one obtained at his instigation and upon his terms, and was a fraud on her."

By disregarding the manifest power which Illinois courts have over their own judgments and decrees where procured through this type of fraud, the Ohio court gave to the Illinois decree *greater* faith and credit than it would have been given in Illinois. This resulted in a grave miscarriage of justice to Petitioner, denying her the opportunity to litigate the question of the manifest fraud perpetrated upon her in the only court in which she could secure jurisdiction over the person of respondent.

CONCLUSIONS

We submit that the Full Faith and Credit Clause of the United States Constitution has never been interpreted by this Court to preclude the modification of a decree of a sister state when such decree has been procured by a manifestly unconscionable fraud.

Because the Supreme Court of Ohio erroneously considered itself compelled to give full faith and credit to the Illinois decree procured by such fraud, the petition for a writ of certiorari should be granted, and the Supreme Court of Ohio reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO

No. A-135153

VIRGINIA S. BLOCK,

Plaintiff,

v.

LOUIS T. BLOCK,

Defendant.

MEMORANDUM

Hoy, J.:

This case is before the Court upon the motion of the defendant for judgment on the pleadings and the opening statement of counsel for plaintiff.

Briefly summarized, the facts upon which plaintiff's prayer for relief is based are as follows:

That she was married to the defendant at Chicago, Illinois, in 1941 and separated from him in 1945; that shortly after the separation the defendant, for the purpose of placing all of his assets amounting to about one million dollars beyond plaintiff's reach, created a purportedly irrevocable trust with the First National Bank of Cincinnati from which the defendant was to receive the income amounting to $25,000.00 per year during his lifetime and the corpus of which was to be distributed among certain charities after defendant's death; that at the time said trust was created, the defendant was under duress and the trust was, therefore, revocable; that the defendant, knowing that he could revoke the trust at will, fraudulently concealed this fact from plaintiff and her attorneys; that

during the pendency of an action for divorce and alimony brought by plaintiff on February 19, 1946 in the Superior Court of Cook County, Illinois, plaintiff and defendant entered into a separation agreement dated February 27, 1946 by the terms of which plaintiff was to receive $110,000.00 in cash, the household furniture of the parties and certain other benefits in full of all claims for alimony or support in the event a divorce was granted; that at the time she entered into said agreement, plaintiff did not know of defendant's intent at the time of creating said trust to conclude a settlement with her based thereon and afterwards to repossess the trust property free of the trust and that had she been aware of this situation she would not have executed the separation agreement; that defendant filed his answer and appearance in the divorce case and on March 12, 1946 the Superior Court of Cook County, Illinois, granted plaintiff a divorce and awarded her alimony in accordance with the terms of the separation agreement which was approved and incorporated by reference in the decree; that plaintiff has received all property and money due her under the agreement and in accordance with the Court's decree; that in 1950 the defendant brought an action in the Common Pleas Court of Hamilton County, Ohio, against the First National Bank of Cincinnati to set aside the trust agreement on the ground that he was under duress and was not a free agent at the time it was made and upon this ground the agreement was set aside and the corpus of the trust estate refunded to defendant; that plaintiff did not learn of the fraud perpetrated upon her until defendant filed his action to set aside the trust agreement in 1950; that plaintiff thereupon in 1951 filed an action in the Superior Court of Cook County, Illinois, in the nature of a Bill of Review setting forth the foregoing allegations and sought to obtain service by publication upon defendant who was, at that time, a resident of Ohio;

that upon defendant's motion said cause was removed to the United States District Court where defendant's motion to quash service of summons was sustained and plaintiff's motion to remand was overruled; that upon appeal by plaintiff to the United States Circuit Court of Appeals the orders of the District Court were affirmed.

Plaintiff's prayer is that this Court set aside those portions of the decree entered by the Superior Court of Cook County, Illinois, in the divorce case as purport to approve the separation agreement; that said agreement be set aside as having been induced by fraud; and that this Court determine and allow to plaintiff such sum as should have been allowed, taking into account the property and true worth of the defendant at the time the agreement was made.

Defendant's motion to dismiss is based on the following grounds:

1. That plaintiff cannot maintain this action because she has not tendered back to the defendant the consideration received for the settlement agreement which she is attempting to set aside;

2. That the Illinois divorce decree, incorporating the settlement agreement, is entitled to full faith and credit and is conclusive;

3. That this action is a collateral attack upon a judgment and cannot be maintained;

4. That this Court has no authority to vacate, modify or annul the judgment or decree of any other court;

5. That there was no fraud.

In view of the conclusion reached with regard to the second ground of defendant's motion, it will be unnecessary to discuss the other propositions advanced therein.

The Court is in agreement with plaintiff's contention that where one, by extrinsic fraud, prevents his adversary

from defending an action or prevents him from presenting all of his case to the Court so that there was, in fact, no adversary trial or decision of the issues involved, the judgment of a court is open to attack in any court of the state in which such judgment was rendered.

Furthermore, the law seems to be well settled that where jurisdiction over the defendant or over the subject-matter of an action is obtained by extrinsic fraud, the judgment of the Court of a sister state may be attacked in the courts of any other state and that the full faith and credit clause of the federal constitution does not prevent the application of this rule.

However, after a careful consideration of the authorities cited in the especially well written briefs submitted by counsel for each of the parties, this court concludes that an existing final judgment and decree of a court of one state cannot be attacked on the ground of fraud in the courts of any other state unless it can be shown that jurisdiction over one of the parties or over the subject of the action was obtained by fraud.

In this case the Illinois Court admittedly had full jurisdiction over the parties and the subject of the action and to grant the relief prayed for would be to substantially impair the validity of the Illinois decree and would violate the full faith and credit clause of the federal constitution.

Defendant's motion will, therefore, be sustained.

An entry may be submitted in accordance herewith, saving exceptions to plaintiff.

* * * * *

APPEARANCES:

HARMON, COLSTON, GOLDSMITH & HOADLY,
Attorneys for Plaintiff,

PAXTON & SEASONGOOD,
Attorneys for Defendant.

April 13, 1954.

APPENDIX B

COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO

No. A-135153

VIRGINIA S. BLOCK,

Plaintiff,

v.

LOUIS T. BLOCK,

Defendant.

JUDGMENT ENTRY

This cause came on to be heard upon the pleadings and the opening statement of counsel for plaintiff, and upon the motion of defendant for judgment on the pleadings and on said opening statement, was argued by counsel and submitted to the court.

ON CONSIDERATION WHEREOF, the court finds that in the judgment entered in the Superior Court of Cook County, Illinois, General No. 43S3509, on or about March 12, 1946, in a suit instituted by the plaintiff against defendant, said court had jurisdiction over the parties and the subject matter of said action, and therefore is entitled to full faith and credit in the courts of this state under the provisions of Article IV, Section I of the Constitution of the United States, and Title 28 U. S. C. A., Section 1738, the Act of Congress implementing said Article and Section, and that this court is without power to reform said decree, for which relief the amended petition prayed.

The court further finds that the other grounds of said motion for judgment on the pleadings and on the opening statement are not well taken and to that extent said motion is overruled.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the within action be dismissed and that the defendant go hence without day and recover his costs from plaintiff in the amount of $..... for which execution may issue. To the granting of said motion for judgment on the pleadings and on the opening statement plaintiff excepts. To the overruling in part of said motion for judgment on the pleadings and on the opening statement defendant excepts.

APPENDIX C

IN THE COURT OF APPEALS,
FIRST APPELLATE DISTRICT OF OHIO,
HAMILTON COUNTY, No. 7908

VIRGINIA S. BLOCK,

Plaintiff-Appellant,

v.

LOUIS T. BLOCK,

Defendant-Appellee.

OPINION

December 20, 1954.

**APPEAL ON QUESTIONS OF LAW,
FROM COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO**

MESSRS. HARMON, COLSTON, GOLDSMITH, & HOADLY, MR. HENRY B. STREET, MR. DOUGLAS G. COLE, and MR. GEORGE H. PALMER, *for Plaintiff-Appellant,*

MESSRS. PAXTON & SEASONGOOD, MR. MURRAY SEASONGOOD, MR. ROBERT P. GOLDMAN, MR. REUVEN J. KATZ, and MR. A. BRUCE SCHIMBERG, *for Defendant-Appellee.*

By the Court.

An examination of the record discloses no error, prejudicial to appellant. The judgment of the Court of Common Pleas of Hamilton County is, therefore, affirmed.

MATTHEWS, P. J., & HILDEBRANT, J., Concur.

APPENDIX D

(Entered of Record 12/24/54)

COURT OF APPEALS
FOR THE FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. 7908

VIRGINIA S. BLOCK,

Plaintiff-Appellant,

v.

LOUIS T. BLOCK,

Defendant-Appellee.

JUDGMENT OF AFFIRMANCE

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof the Court find there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is thereby affirmed, and that the appellee recover from the appellant, her costs herein expended, taxed at $.....

.....

And the Court being of the opinion that there was reasonable ground for this appeal, allow no penalty.

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment.

To all of which appellant, by her counsel excepts.

APPENDIX E

IN THE
SUPREME COURT OF OHIO

No. 34338

BLOCK,

Appellant,

v.

BLOCK,

Appellee.

Supreme Court—Dismissal—No debatable constitutional question involved—Divorce decree obtained in sister state—Incorporation of property settlement—Authority to examine and alter foreign decree—Section 1, Article IV, U. S. Constitution—Full faith and credit—Equitable relief—Collateral attack on foreign judgment for fraud—Foreign court having jurisdiction of parties and subject matter.

(No. 34338—Decided April 13, 1955.)

APPEAL from the Court of Appeals for Hamilton County.

Messrs. Harmon, Colston, Goldsmith & Hoadly, Mr. Henry B. Street, Mr. Douglas G. Cole and Mr. George H. Palmer, for appellant.

Messrs. Paxton & Seasongood, Mr. Robert P. Goldman, Mr. Reuven J. Katz and Mr. A. Bruce Schimberg, for appellee.

It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., MATTHIAS, HART, STEWART, BELL and TAFT, JJ., concur.

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SUBJECT INDEX

PAGE

Reply Brief in Support of Petition for Certiorari 1

1. The Only Question Presented to the State Court Was the Federal Question 2

2. The Non-Federal Grounds Urged by Respondent Are Inadequate and Insubstantial 3

(a) Tender Back Was Not Required 4

(b) The Amended Petition Does State a Cause of Action in Fraud 6

TABLE OF CASES

Asher v. Asher, 249 Ky. 215, 60 S. W. (2d) 592, 1933 ... 7

Blankenship v. Hall, 233 Ill. 116, 84 N. E. 192, 1908 9

Bowlus v. Shanabarger, 19 O. C. C. 137, 1899 9

Eldridge v. Eldridge, Texas Civil App., 259 S. W. 209, 1924 7

Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062, 1893 . 4

Geiger v. Merle, 360 Ill. 497, 196 N. E. 497, 1935 9

Green v. Acacia Mut. Ins. Co., 98 O. A. 101, ... N. E. (2d) ..., 1954 3

Greenberg v. Snodgrass, 95 O. A. 307, 119 N. E. (2d) 114, 1953 3

Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N. E. (2d) 736, 1940 9

Hoeffner v. Hoeffner, 389 Ill. 253, 59 N. E. (2d) 684, 1945 10

Holzbeierlein v. Holzbeierlein, 91 F. (2d) 250, C. A., Dist. of Col., 1937 9

Indiana, ex rel. Anderson v. Brand, 303 U. S. 95, 1937 .. 2

In Re Estate of Barrow, 27 Cal. App. (2d) 402, 80 P. (2d) 1006, 1938 5

PAGE

In Re McNutt's Estate, 36 Cal. App. (2d) 542, 98 P. (2d) 253, 1940 5

Klinger v. Missouri, 13 Wall. 257, 263, 1871 11

Locke-Paddon v. Locke-Paddon, 194 Cal. App. 73, 227 P. 715, 1924 5

Mark v. Mark, 145 O. S. 301, 61 N. E. (2d) 595, 1945 9

Meyer v. Meyer, 153 O. S. 409, 91 N. E. (2d) 892, 1950 8

Milekovich v. Quinn, 40 Cal. App. 537, 181 P. 256, 1919 ..... 5, 7

Miller v. Miller, 134 Fla. 725, 184 So. 672, 1938 7

Nelson v. Lagow, 12 How. 98, 1851 3

Patterson v. McLenethan, 296 Ill. 475, 129 N. E. 767, 1921 9

Sapp v. Superior Court, 119 Cal. App. (2d) 645, 260 P. (2d) 119, 1953 7

Sime v. Malouf, et al., 95 Cal. App. (2d) 82, 212 P. (2d) 946, 1949 ..... 5, 8

State, ex rel. Industrial Commission v. Day, 136 O. S. 477, 26 N. E. (2d) 1014, 1940 2

Vragnisan v. Savings Union Bank & Trust Co., 31 Cal. App. 709, 161 P. 507, 1916 7

Williams v. Kaiser, 323 U. S. 471, 1944 3

Wright v. Holmes, 100 Maine 508, 62 A. 507, 1905 9

Zakroczymski v. Zakroczymski, 303 Ill. 264, 135 N. E. 398, 1922 9

OTHER AUTHORITIES

41 Corpus Juris. Secundum, § 20, p. 418 9

3 Freeman on Judgments, § 1264, p. 257 6

14 Ohio Jurisprudence, § 88, p. 203 8

Ohio Revised Code, § 3103.05 7

Williston on Contracts, Vol. 5, p. 4290 4

IN THE

Supreme Court of the United States

October Term, 1955

No. 223

VIRGINIA S. BLOCK,

Petitioner,

v.

LOUIS T. BLOCK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

It is the contention of Petitioner that the sole question presented by the record in this cause, and decided by the various Ohio Courts, is the federal question of the improper application of the full faith and credit clause of the United States Constitution, Article IV, Section I, as set forth in the Petition for Certiorari.

Respondent has disputed this, and has alleged that there were both federal and non-federal questions presented to the Ohio Courts, and that "presumably" it could be found that the cause was decided upon the non-federal questions.

It is true that this Court will not review a cause where it appears from the record that the decision of the state court might have been either on a state ground or on a federal

ground, and where it appears that the state ground is sufficient to sustain the judgment. *Williams* v. *Kaiser*, 323 U. S. 471, 1944. Also it is true that there are two well settled exceptions to this rule, viz:

1. "Where the state court does not decide against the petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review." *Indiana, ex rel. Anderson* v. *Brand*, 303 U. S. 95, 1937.

2. "If the independent state ground is not a substantial or sufficient one, 'it will be presumed that the State Court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.'" *Williams* v. *Kaiser*, 323 U. S. 471, 1944.

Applying this rule and its exceptions to the instant cause it is petitioner's contention that:

1. An examination of the record reveals that the *only* question presented to the Supreme Court of Ohio was the Federal question. The Judgment Entry of the Trial Court sustained the motion for judgment on the pleadings and opening statement *on one ground only*, that under the provisions of the full faith and credit clause, the Court was powerless to reform the Illinois decree. The non-federal grounds of failure to tender back and absence of actionable fraud were specifically overruled. (Pet. App. B. 5a, 6a). The Trial Court's Memorandum Opinion, while appended to the Petition for Certiorari as an exhibit (Pet. App. A, 1a), is not a part of the record, and what was stated therein cannot be considered, the Court speaking only through its journal. *State, ex rel. Industrial Commission* v. *Day*, 136 O. S. 477, 26 N. E. (2d) 1014, 1940.

The Plaintiff, petitioner here, thereupon appealed to the Ohio Court of Appeals on the sole ground of full faith and

credit. The defendant, respondent here, did not file a separate appeal as to those non-federal grounds which had been overruled by the Trial Court, although the law of Ohio requires this as a prerequisite to the filing of cross-assignments of error. *Greenberg* v. *Snodgrass Co.*, 95 O. A. 307, 119 N. E. (2d) 114, 1953. Defendant did file cross-assignments of error, under which the non-federal grounds were urged. However, under Section 2505.22, Revised Code of Ohio, such cross-assignments of error are passed upon by the Appellate Court *only* after the Court has concluded to reverse the judgment. *Green* v. *Acacia Mut. Ins. Co.*, 98 O. A. 101 ... N. E. (2d) ..., 1954. In this case the judgment of the Trial Court was affirmed. The Appellate Court therefore did not pass upon these cross-assignments of error, and they are not properly a part of the record in this cause. *Greenberg* v. *Snodgrass Co.*, 95 O. A. 307, 119 N. E. (2d) 114, 1953.

The record further reveals that upon appeal as a matter of right to the Supreme Court of Ohio, the Plaintiff again urged the federal question as her sole basis for appeal. No non-federal grounds were raised by the defendant in the record. Defendant did argue these questions in his brief, but this obviously is not a part of the record.

The record revealing that no non-federal grounds were before either the Court of Appeals or Supreme Court of Ohio, the affirmance by these Courts of the decision of the Trial Court, "must be taken that . . . (they) . . . affirmed the correctness of the decision thus excepted to. . . ." *Nelson* v. *Lagow*, 12 How. 98, 1851, the exception in this case being the federal question of full faith and credit.

2. Any further doubt as to the presence of the federal question is dissipated by closer examination of the two non-federal grounds which respondent claims are involved, under the rule of *Williams* v. *Kaiser*, 323 U. S. 471, 1944.

Neither is adequate to sustain the decision rendered by the Ohio Courts. This is made evident by the judgment entry of the Trial Court, which held:

> "The Court further finds that the other grounds of said motion . . . are not well taken and to that extent said motion is overruled." (Pet. App. B, p. 6a.)

The weight of authority throughout the United States is in accord with the Trial Court's position on both non-federal grounds.

(a) The first non-federal ground urged is that petitioner did not tender back the consideration which she received under the property settlement agreement prior to filing this action for reformation. Cited in support of this ground are cases establishing the rule that in an action for rescission of a contract for fraud, the defrauded party, in order to reestablish the status quo, must first tender the consideration previously received.

This rule, and the cases cited thereunder by respondent, have no application to the instant cause, as was recognized by the Trial Court. The equitable rule within which this case is correctly brought is stated in the following quotation:

> ". . . one who attempts to rescind a transaction on the ground of fraud, mistake or otherwise, is not bound to restore that which he has received by virtue thereof when in any event he is entitled to retain it as indisputably his own, whatever may be the fate of his effort to rescind the transaction." *Williston on Contracts*, Vol. 5, p. 4290.

The logic of this rule is clearly explained in *Galusha* v. *Galusha*, 138 N. Y. 272, 33 N. E. 1062, 1893, where the Court held, in a similar action to set aside a separation agreement:

"The plaintiff cannot be required to restore to the defendant what she may have received as a condition of obtaining the relief which she seeks. The compensation she has received is simply the equivalent of the support which the defendant was legally bound to provide for her while the marriage relation continued, and which he was equitably bound to furnish when it was dissolved because of his infidelity to it. . . . The rule which requires a party seeking to rescind a contract on the ground of fraud or other wrong to restore, or offer to restore, the fruits of it before rescission will be decreed, has no application here. It rests upon equitable considerations which disappear in a case like the present, where nothing has been received, except as a substitute for the discharge of a duty by the adverse contracting party, and from the performance of which he has been absolved during the existence of the contract . . . (If this action is) successful in the pursuit of the relief which it may afford, the court can allow such sum as may be equitable and just from the date of the commencement of this action, and may modify the judgment in the divorce suit accordingly."

To the same effect are the following cases, all involving actions to set aside or *modify* property settlement agreements procured through fraud.

Milekovich v. *Quinn,* 40 Cal. App. 537, 181 P. 256, 1919;
Sime v. *Malouf, et al.,* 95 Cal. App. (2d) 82, 212 P. (2d) 946, 1949;
In Re Estate of Barrow, 27 Cal. App. (2d) 402, 80 P. (2d) 1006, 1938;
Locke-Paddon v. *Locke-Paddon,* 194 Cal. 73, 227 P. 715, 1924;
In Re McNutt's Estate, 36 Cal. App. (2d) 542, 98 P. (2d) 253, 1940.

Respondent attempts to evade the force of this rule by arguing that petitioner is not necessarily entitled to the consideration she received under the property settlement

agreement. This reasoning ignores the fact that respondent has not asserted in the record at any point a challenge to the right of petitioner to alimony, as such, nor has he asserted any right to that sum which she has already received. The dispute is as to the *quantum* of respondent's liability in that *additional* sum fraudulently withheld from the Illinois Court. If petitioner establishes her claim, the amount previously received may be deducted from the total amount found to be due; if she fails, she will be entitled to retain the amount previously received, as the right to this lesser amount is not an issue in this cause.

Tender back is required only under equitable principles to prevent the taking of unfair advantage. It is not required where the ends of justice do not demand it, and where it would be an idle ceremony. It cannot be contended that the Ohio Courts based their decision in this cause on so inadequate a ground.

(b) The second non-federal ground similarly is inadequate. The defendant, respondent here, raised the defense that the amended petition did not state a cause of action because the allegations as to fraud were mere expressions of legal opinion, not misrepresentations of material facts, and did not result in injury to petitioner. A brief recitation of the fraud alleged serves to dispel this illusion.

The essence of the fraud alleged was in the knowledge and concealment of such knowledge by respondent that the trust had been entered into under coercion and undue influence, and that it could be set aside at any time, thus arming respondent with the power to revest himself with the entire corpus, at his pleasure. This knowledge resided in the respondent and his attorney, and was of a material fact, viz., the full nature and extent of his property.

The rule is stated in *3 Freeman on Judgments*, § 1264, page 257:

> "The fraudulent concealment of facts which if known at the trial would have prevented the recovery is always good ground for coming into equity, to obtain relief from a judgment at law."

And in § *1235*, it is said:

> "Where there is a solemn duty to speak, independently of coercion, and in a judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the impoverishment of the one to whom that duty is owing, there is a fraud of the most serious nature, and in a sense both intrinsic and extrinsic."

Examples of cases in which concealment by the husband of the true extent of his worth was held to be material fact, constituting actionable fraud, are:

Eldridge v. *Eldridge*, Texas Civil App., 259 S. W. 209, 1924;
Vragnisan v. *Savings Union Bank & Trust Co.*, 31 Cal. App. 709, 161 P. 507, 1916;
Asher v. *Asher*, 249 Ky. 215, 60 S. W. (2d) 592, 1933;
Miller v. *Miller*, 134 Fla. 725, 184 So. 672, 1938;
Sapp v. *Superior Court*, 119 Cal. App. (2d) 645, 260 P. (2d) 119, 1953;
Milekovich v. *Quinn*, 40 Cal. App. 537, 181 P. 256, 1919.

The very fact constituting the fraud was that petitioner did not know that respondent had been under coercion and undue influence when he signed the trust, or that respondent had been advised that this was sufficient grounds for the setting aside of the trust.

Respondent's duty to speak was clear. Ohio Revised Code, § 3103.05 states:

> "A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other."

Any agreement entered into between husband and wife must be made with reference to the duty set forth by this section, even though the parties may be separated, and this calls for full disclosure of all facts. *Meyer* v. *Meyer*, 153 O. S. 409, 91 N. E. (2d) 892, 1950. Where such confidential relationship exists, even fraudulent misrepresentations of opinion constitute actionable fraud. *Sime* v. *Malouf*, 95 Cal. App. (2d) 82, 212 P. (2d) 946, 1949.

At the time the settlement agreement was signed, February 27, 1946, petitioner did not know, and had no way of discovering, in view of the concealment by respondent, that the trust was executed under coercion and undue influence. This one fact was the key to the validity or invalidity of this trust, and it was kept from petitioner from the time the trust was signed on October 18, 1945, until June 6, 1950, when this information became public knowledge as a result of respondent's suit to set aside the trust on the ground of undue influence.

Petitioner did suffer damage by reason of this fraud. On the basis of the facts known to her in 1945-46, the Ohio trust was truly irrevocable. The basic rule is stated in 14 *Ohio Jurisprudence*, § 88, page 203:

> "The husband having absolute dominion over his personalty during his lifetime, it has been held that he may, by a bona fide gift inter vivos, deprive his widow of any share in the same; this act constitutes no fraud upon her marital rights, . . ."

cited in *Mark* v. *Mark*, 145 O. S. 301, 61 N. E. (2d) 595, 1945.

If a valid gift inter vivos of personalty is made during estrangement, by the husband, leaving him reduced but sufficient assets to pay to the wife her separate maintenance or alimony, and the gift is bona fide, it is not a fraud on the wife, just as it is not a fraud on any other creditor. See *41 C. J. S.* § *20*, page 418; *Bowlus* v. *Shanabarger*, 19 O. C. C. 137, 1899, and *Holzbeierlein* v. *Holzbeierlein*, 91 F. (2d) 250, C. A., Dist. of Col., 1937.

It is clear that if the husband makes an irrevocable gift of personalty, even when he reserves a life estate unto himself, but retains sufficient assets to support his wife, such a gift is valid and may not be attacked by the wife as a fraud on her marital rights. *Wright* v. *Holmes*, 100 Maine 508, 62 A. 507, 1905.

Petitioner was not mistaken as to the legal effect of this trust on her marital rights, based on the facts at hand. While this trust, on its face, placed the corpus out of the control of respondent, and was irrevocable, it nevertheless provided respondent with an income of $25,000.00 per year, or enough legally to satisfy petitioner's demands for support. Under the law, as long as he kept enough assets to satisfy his creditors, including his wife, in her demand for support, his transfers of the remainder of his assets, if otherwise bona fide, were valid.

This rule is the law in Illinois, as indicated by:

Blankenship v. *Hall*, 233 Ill. 116, 84 N. E. 192, 1908;
Patterson v. *McLenathan*, 296 Ill. 475, 129 N. E. 767, 1921;
Zakroczymski v. *Zakroczymski*, 303 Ill. 264, 135 N. E. 398, 1922;
Geiger v. *Merle*, 360 Ill. 497, 196 N. E. 497, 1935;
Haskell v. *Art Institute of Chicago*, 304 Ill. App. 393, 26 N. E. (2d) 736, 1940;

Hoeffner v. *Hoeffner*, 389 Ill. 253, 59 N. E. (2d) 684, 1945.

It is clear that a fraud on petitioner's marital rights was, in fact, practiced. Respondent had a right to give $970,000.00 away during his lifetime, subject to petitioner's right to support. In such case, petitioner, had she not divorced respondent, would have had no rights, at his death, to this property. The alternative she faced, so she thought at the time of the settlement negotiations, was take support and alimony from his income for his life, or take the $110,000.00 offered.

In reality, respondent had not divested himself of this $970,000 at all, but had merely developed a fraudulent scheme, which, in form, gave the appearance of a bona fide gift. He had control at all times, secure in the knowledge that this trust could be set aside on the ground of coercion and undue influence. Had petitioner shared this knowledge with respondent at the time of the settlement negotiations, she would not have settled for the $110,000 because she would have known that the trust could have been set aside by her, and had she not divorced him, she would have been entitled, at his death, to her distributive share of such fund, a figure far in excess of $110,000. The concealment of this knowledge resulted, as respondent knew it would, in petitioner perforce accepting a greatly reduced and manifestly unequitable sum. Redress for this fraud traditionally is within the power of equity to correct. The Ohio Courts obviously did not base their decisions on this ground.

Neither of the non-federal grounds urged by respondent being adequate or sufficient to support the judgment of the State Court, "it will be presumed that the State Court based its judgment on the law raising the Federal question,

and this Court will then take jurisdiction." *Klinger* v. *Missouri*, 13 Wall, 257, 263, 1871.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 223

VIRGINIA S. BLOCK,

Petitioner,

v.

LOUIS T. BLOCK,

Respondent.

BRIEF IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

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SUBJECT INDEX

PAGE

Statement 2

Argument 5

I. The Judgment of the Ohio Supreme Court Was General and Might Have Been and Presumably Was Based on an Arguable Non-Federal Ground of Defense. So, a Petition for Writ of Certiorari Upon a Federal Ground Included in the Issues Will Not Be Entertained 5

II. The Motion to Certify Should Be Overruled Because Lack of Tender and Claim of No Actionable Fraud Are Defenses Involving the State Law of Ohio and (A) An Action to Set Aside a Settlement, Release and Judgment Embodying Same Cannot Be Maintained Without Tender of the Consideration Received (Which Was Not Made Here); and (B) The Fraud Alleged Is (1) Substantially an Expression of Legal Opinion Only and (2) Not Something Plaintiff Had a Right to Rely On. Having Competent Legal Advice, She Was Bound to Know, Treating Her Allegations as True, the Trust Was a Fraudulent Assignment to Defeat Her Rights as a Creditor and Could Be Set Aside for That Reason 7

III. The Federal Question If Presented for Consideration, Lacks Merit, Is Unsubstantial and Not Debatable. The Fraud Alleged Is Intrinsic and the Decree May Not Be Attacked for Intrinsic Fraud 11

Conclusion 12

TABLE OF CASES

	PAGE
Adler v. Adler, 373 Ill. 361 (1940)	11
Aetna Ins. Co. v. Reed, 33 O. S. 283 (1877)	10
Atkinson v. Jordan, 5 Ohio 293 (1832)	11
Babcock v. Farwell, 245 Ill. 14 (1910)	9
Barnard v. Michael, 392 Ill. 130 (1945)	11
Block v. Block, 163 O. S. 230 (1955)	4
Cantrell v. City of Cruthersville, 222 F. (2d) 428, 429 (C. A. 8th, 1955)	6
Centrello v. Basky, 164 O. S. 41, 49, 53 (1955)	6
Coe v. Coe, 334 U. S. 378 (1948)	11
Cross v. Ledford, 161 O. S. 469 (1954)	9
Dice v. Akron, Canton & Youngstown Rd. Co., 155 O. S. 185 (1951)	9
Durham v. New Amsterdam Cas. Co., 208 F. (2d) 342 (C. A. 4th, 1953)	11
Ellis v. Dixon, 349 U. S. 458, 75 S. Ct. 850 (1955)	5
Forrest v. Fey, 218 Ill. 165 (1905)	11
Franceschi v. Franceschi, 326 Ill. App. 494 (1945)	11
Hays v. Lindquist, 22 O. App. 58 (1926)	11
In re Estate of Gray, 162 O. S. 384, 391 (1954)	9
Johnson v. Muelberger, 340 U. S. 581 (1951)	11
Kut v. Bureau of Workmen's Compensation, 329 U. S. 669 (1946)	5
Lape v. Lape, 99 O. S. 143, 151 (1918)	6
Lawlor v. National Screen Service Corporation, 349 U. S. 322 (1955)	11
Lees v. Akshun Mfg. Co., 205 F. (2d) 577, 583 (C. A. 7th, 1953)	9
Michael v. American National Bank, 84 O. S. 370 (1911)	11
Mulcahy v. Akron, 111 O. S. 836 (1924)	6
Nichols v. Nichols, 306 N. Y. 490 (1954)	11
Peters v. Hobby, et al., 348 U. S. 882 (1955)	5
Picklesimer v. B. & O. R. R. Co., 151 O. S. 1 (1949)	9

PAGE

Potter v. Baker, 162 O. S. 488, 503 (1955) 6
Pritz v. Messer, 112 O. S. 628 (1925) 6
Rehill v. Rehill, 306 N. Y. 126 (1953) 11
Rose v. Rose, 34 O. App. 89 (1929) 11
Schacht v. Schacht, 295 N. Y. 439 (1946) 11
Sheard v. Green, 219 La. 199 (1951) 11
Sherrer v. Sherrer, 334 U. S. 343 (1948) 11
Sistare v. Sistare, 218 U. S. 1 (1910) 11
Snoderly v. Brown and Firestone Bank, 56 O. L. A. 47 (Ct. App. 1949) 10
Sponseller v. Sponseller, 110 O. S. 395 (1924) 12
State v. Brewer, 155 O. S. 203, 205 (1951) 11
State v. Telegraph Co., 154 O. S. 511 (1951) 6
State, ex rel. v. Westlake, 154 O. S. 412 (1951) 6
State, ex rel. Barner v. Marsh, 121 O. S. 321 (1929) 8
Steffens v. Steffens, 408 Ill. 150 (1951) 11
United States v. Throckmorton, 98 U. S. 61 (1878) 11
Wallinan v. Hughes, 196 Va. 117 (1954) 11
Ward v. Ward, 63 O. S. 125 (1900) 11
Williams v. North Carolina, 317 U. S. 287 (1942) 11
Williams v. North Carolina, 324 U. S. 226, 229 (1945) 11
Yappel v. Mozina, 33 O. App. 371 (1929) 10
Yendes v. Shaw, 83 O. App. 300 (1948) 10

OTHER AUTHORITIES

Ohio Constitution, Sec. 2, Article V 5
19 O. Jur. 352, Fraud & Deceit, Sec. 46 10
21 O. Jur. 376, Husband & Wife, Sec. 51 11
3 O. Jur. (2d) Sec. 680, pp. 629-631 6
3 O. Jur. (2d) 546, Sec. 608, App. Rev. 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 223

VIRGINIA S. BLOCK,

Petitioner,

v.

LOUIS T. BLOCK,

Respondent.

BRIEF IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

The writ should not be allowed, because the "Questions Presented," "Statement of the Case," "How Federal Question Is" (said to be) "Presented" and the supposed "Reasons for Granting the Writ," as set out in the petition, are incorrect, incomplete and furnish no ground for allowance of certiorari. Especially, not disclosed from these is the fact the judgment of the Ohio Supreme Court sought to be reviewed may have been and presumably was rested on a tenable non-federal ground; and, hence, will not be reviewed by this Court.

STATEMENT

For a number of the allegations in the petition, no rec
reference is, or can be, supplied. We shall not attempt
point out all of these nor to show their incorrectness.
present, however, some salient facts which, of themselv
demonstrate this is not a suitable case for allowance o
writ:

In the "Memorandum" opinion of the Common Pl
Judge of Hamilton County, Ohio (Pet. App. A, 1a), i
brief summary of the amended petition and of defendar
(respondent's) motion for judgment on the pleadings a
the opening statement of counsel for plaintiff (id. 3
Grounds 1 and 5 of this motion are non-federal, sett
up, 1, lack of tender, and, 5, there was no fraud. T
Court's opinion said (id. 3a bot.):

> "In view of the conclusion reached with regard
> the second ground of defendant's motion, it will
> unnecessary to discuss the other propositions advan
> therein."

This second was the full faith and credit ground, and w
that on which the Court's decision sustained the mot
to dismiss the case.

The judgment of the trial Court, however, did not co
port with this decision. It found the grounds of
motion, other than the second, not well taken and ov
ruled defendant's motion to that extent (Pet. App.
5a, 6a). Defendant excepted

> "to the overruling in part of said motion for ju
> ment on the pleadings and on the opening sta
> ment . . ." (id. 6a, last sentence).

After the plaintiff, petitioner here, had appealed
questions of law to the Ohio Court of Appeals, First
pellate District, respondent filed cross assignments

error there as permitted by Revised Code of Ohio, Sec. 2505.22:

> "Assignments of error may be filed on behalf of an appellee which shall be passed upon by a reviewing court before a judgment or order is reversed in whole or in part. . . ."

Rule VII of the Court of Appeals provides in part:

> "Within fifteen (15) days after the filing of the appellant's brief, counsel for appellee shall file like brief and also, at his election, assignment of errors on his behalf. . . . The appellee's brief shall include such reasons and authorities in support of his assignments of error, as he may desire as well as an answer to appellant's brief. The appellant's reply brief may cover all matter in the appellee's brief."

Respondent's (defendant appellee in the Ohio Court of Appeals) assignment of errors is (according to the Rule 21(1) notice) in the record submitted by petitioner. The defendant could not and did not attempt to cross appeal, since he could not appeal from a final judgment in his favor, whatever were the reasons assigned for his winning the case.

Neither the opinion of the Ohio Court of Appeals (Pet. App. C, 7a) nor its judgment (Pet. App. D, 8a) shows the ground or grounds on which that Court affirmed the judgment below. It is impossible to say with certainty, therefore, whether that judgment rests on a federal or non-federal ground. Petitioner here did not apply to the Court to have its opinion or judgment made more specific. So, with a general judgment, she left in force the presumption that, where a judgment might have been based on a federal or non-federal ground involved in the issues, it is based on the non-federal ground.

In the printed brief in the Supreme Court of Ohio, first point under "ARGUMENT" (p. 3) in support defendant-appellee's motion to dismiss and in opposit to motion to certify is:

> "I. An appeal of right to this Court will be missed where the case can be and may have b disposed of without considering any constitutio question."

The other points made were:

> "II. The Illinois divorce decree incorporating settlement agreement is entitled to full faith credit and is conclusive.
> "III. Plaintiff cannot maintain this action beca she has not tendered to defendant the considerat received for the settlement agreement she is atten ing to set aside.
> "IV. On the basis of allegations in the amen petition and the opening statement no actiona fraud is shown."

The orders of the Ohio Supreme Court refusing p tioner's motion to certify and dismissing the appeal a right on claim of constitutional question are not prin by petitioner (Cfr. this Court's Rule 24 [1] [j]). T Court does not assign reasons for allowance or disall ance of motion to certify; and the judgment of dismi was "for the reason that no debatable constitutional q tion is involved" (163 O. S. 230). The headnote of opinion reproduced in Appendix E of the petition her not that of the Court, but of the reporter. It inclu however, "—*Equitable Relief*—", a somewhat cryptic pression, but doubtless intended to show a sustaining the decision of contention by appellee that before equit

relief, such as avoidance of a voidable contract, may be had, the seeker must have done equity and made tender back of what was received under the contract attacked.

Again, in the Supreme Court of Ohio, since there was no showing in either the opinion or judgment, of the court's ground for these, it will be presumed, then, the motion to certify was overruled on the ground no error had intervened and the case was not one "of public or great general interest" (Ohio Constitution, Sec. 2, Article V); and the appeal of right was dismissed because the judgment appealed from could have been and presumptively was rested on non-federal grounds.

So, the only question really presented is:

Where in a state court the issues include both federal and non-federal questions and the judgment of the highest court of the state is general for the defendant, without any specification of ground on which the judgment is rested, will a petition for writ of certiorari be entertained?

Respondent says the answer to this question is "No." We submit, therefore, nothing further need be added in opposition to allowance of the petition for the writ, and that it should be denied. At the risk of 'painting the lily,' however, we append the following which the Court may or may not care to read:

ARGUMENT

I. The Judgment of the Ohio Supreme Court Was General and Might Have Been and Presumably Was Based on an Arguable Non-Federal Ground of Defense. So, a Petition for Writ of Certiorari Upon a Federal Ground Included in the Issues Will Not Be Entertained.

Ellis v. *Dixon*, 349 U. S. 458, 75 S. Ct. 850 (1955). *Peters* v. *Hobby, et al.*, 348 U. S. 882 (1955).

In *Kut* v. *Bureau of Workmen's Compensation*, 329 U. S. 669 (1946), an appeal from a judgment of the Ohio

Supreme Court was dismissed on the ground it was or could have been based upon a non-federal ground adequate to support it. A late case is, *Cantrell* v. *City of Caruthersville*, 222 F. (2d) 428, 429 (C. A. 8th, 1955). In Ohio, a reviewing court will look into the record and if the judgment under review is right for any reason, will affirm it, no matter what reasons the lower court may have assigned for its judgment. *Mulcahy* v. *Akron*, 111 O. S. 836 (1924); *Lape* v. *Lape*, 99 O. S. 143, 151 (1918); *Pritz* v. *Messer*, 112 O. S. 628 (1925).

The presumption is the Supreme Court of Ohio did not decide the constitutional issue, since it is a recognized principle of law in Ohio, as in this Court and elsewhere, that constitutional questions will not be decided until the necessity for their decision arises. *State* v. *Telegraph Co.*, 154 O. S. 511 (1951); *State, ex rel.* v. *Westlake*, 154 O. S. 412 (1951).

In addition, since the case could have been decided on other grounds which are equally correct, it will be presumed that the court decided the case on one or more of such grounds. The situation is analogous to the two-issue rule which was most recently recognized in *Centrello* v. *Basky*, 164 O. S. 41, pars. 4 and 8 syl., pp. 49, 53 (1955), 28 Ohio Bar, No. 29 (July 18, 1955), and in *Potter* v. *Baker*, 162 O. S. 488, 503 (1955), thus,

> ". . . The grounds upon which a judgment or ruling is placed are not the subject of review. The thing to be examined is the judgment or ruling itself and that may be entirely sound, even though the grounds upon which it is placed are wholly erroneous."

3 *O. Jur.* (2d), Sec. 680, pp. 629-630, note 19, and p. 631 and note 10.

Again, as stated in 3 *O. Jur.* (2d) 546, Sec. 608, App. Rev.:

> "An appeal on questions of law brought to the Supreme Court as a matter of right on the claim that a constitutional question is involved will be dismissed . . . if the record discloses that the case can be disposed of without entering upon the consideration of any constitutional question. . . ."

II. The Motion to Certify Should Be Overruled Because Lack of Tender and Claim of No Actionable Fraud Are Defenses Involving the State Law of Ohio and (A) An Action to Set Aside a Settlement, Release and Judgment Embodying Same Cannot Be Maintained Without Tender of the Consideration Received (Which Was Not Made Here); and (B) The Fraud Alleged Is (1) Substantially an Expression of Legal Opinion Only and (2) Not Something Plaintiff Had a Right to Rely On. Having Competent Legal Advice, She Was Bound to Know, Treating Her Allegations as True, the Trust Was a Fraudulent Assignment to Defeat Her Rights as a Creditor and Could Be Set Aside for That Reason.

(A) Par. 17 (p. 8) of plaintiff's amended petition relating to tender shows she made none and that she was willing to allow the money she received only as a credit if she was granted more from the Court than was agreed to and obtained in the settlement decree. She avers she had left only $38,250.00;

> "but that she is willing to allow the amount of money received by her as aforesaid as a credit upon such sum as shall be determined by the Court herein to be properly paid and awarded to her over and above said $110,000.00."

The sixth defense of defendant's answer to the amended petition pleads lack of tender of the $110,000.00, and of $750.00, and of furniture, furnishings and effects, of a value of at least $5,000.00, which the petitioner received in settlement of her claim for alimony. Her reply, V, says:

> "For reply to the Sixth Defense, Plaintiff denies that she is required to tender back to defendant any monies received from him pursuant to said alimony agreement, but avers that this court has jurisdiction to render all equitable relief to which Plaintiff may be entitled."

The sixth paragraph of the syllabus of *State, ex rel. Barner* v. *Marsh*, 121 O. S. 321 (1929), which involved an attempt to set aside an alimony settlement in a divorce case, reads:

> "Where a party has received and accepted the fruits and benefits of a judgment in his favor, he will not be heard to challenge the validity of such judgment without first restoring or offering to restore such fruits and benefits to the adverse party."

In Ohio, the syllabus is the law of the case. The rule of the Ohio Supreme Court establishing this reads, in part:

> "RULE VI
> "POINTS DECIDED
>
> "In each cause a syllabus of the points decided by the Court, shall be stated in writing by the Judge assigned to prepare the opinion of the Court. Such syllabus shall be confined to the points of law arising from the facts of the cause as determined by the Court. . . ."

Page's Ohio Revised Code Annotated, Titles 25, 27, p. 62. See, also, reporter's note in 94 O. S. p. ix, 1917:

> "There can be no question, . . . that in cases bearing a date subsequent to February 1, 1858, the syllabus is the law of the case."

The petitioner here is seeking to have set aside part of an agreement and decree which she obtained as plaintiff. This

decree calls for a lump sum payment and other considerations, and contains no reservation of continuing jurisdiction over the parties.

See, also, *Dice* v. *Akron, Canton & Youngstown Rd. Co.*, 155 O. S. 185 (1951); *Lees* v. *Akshun Mfg. Co.*, 205 F. (2d) 577, 583 (C. A. 7th, 1953); *In re Estate of Gray*, 162 O. S. 384, 391 (1954), citing *Picklesimer* v. *B. & O. R. R. Co.*, 151 O. S. 1 (1949).

In *In re Estate of Gray*, it was decided that where there is, as was the fact in the present case, a genuine dispute as to what the plaintiff should have gotten, in every such case, a tender is a prerequisite to relief. The doctrine of tender back applies to releases whether given for claims for torts or in connection with contracts. The first paragraph of the syllabus in *Cross* v. *Ledford*, 161 O. S. 469 (1954) reads:

> "Where a contract has been procured by fraudulent representations of a party thereto, the party defrauded after offering to return what he has received under the contract, may elect to have the contract set aside and be restored to his original position."

In *Babcock* v. *Farwell*, 245 Ill. 14 (1910), the fourth paragraph of the headnote reads:

> "The inability of the party to restore the consideration for a contract which he seeks to rescind will not relieve him from the necessity of doing so, and it is not sufficient to offer to set off the amount against what is claimed from the other party."

The seventh paragraph of the headnote reads:

> "A release procured by fraud as to the consideration is binding until set aside in equity, and the party executing it cannot be relieved from it without returning the consideration."

The judgment of the Common Pleas Court in this c
(App. B, 6a), finding all grounds of the motion for ju
ment on the pleadings and the opening statement not
taken except the federal full faith and credit defense
not only at variance with its opinion (id. 3a), but with
settled applicable law of Ohio, which governs and nece
tated a ruling plaintiff's action had to be dismissed beca
indisputably, plaintiff, in the trial court, made no ten
This Ohio law was doubtless adhered to as a ground
the judgments of the appellate and Supreme Court
Ohio.

(B) Of the accusations in the trial court amended p
tion and in the petition here aimed at respondent and
present counsel (not such at the time the trust was m
in October 1945), these are denied in the answer to
amended petition and some are not supported by the pl
ings and opening statement. Some, however, have to
treated as true for purposes of the motion to dism
But, so treated, they are immaterial because of the c
plete defense of no tender, shown in (A). Moreover,
they were substantially mere expressions of legal opi
of defendant's to plaintiff's attorneys and not a re
sentation of material facts. Expressions of legal con
sions are not a basis for actionable fraud.

In 19 *O. Jur.* 352, Fraud and Deceit, Sec. 46, it is sta

> "An opinion as to the plaintiff's legal rights is n
> representation of fact,"

citing *Aetna Ins. Co.* v. *Reed*, 33 O. S. 283 (1877). See, a
Yappel v. *Mozina*, 33 O. App. 371 (1929); *Yendes* v. *Sh*
83 O. App. 300 (1948); *Snoderly* v. *Brown and Firest*
Bank, 56 O. L. A. 47 (Ct. App. 1949).

(2) Finally, on this branch of the case, fraudu
representations, if made, were immaterial, because no

jury resulted therefrom. Since the wife was a creditor, the trust prevented her from satisfying her just demands for property and support and was, therefore, a conveyance in fraud of her as a creditor and she could set it aside for that reason alone. *Atkinson* v. *Jordan*, 5 Ohio 293 (1832); *Ward* v. *Ward*, 63 O. S. 125 (1900); 21 *O. Jur.* 376, Husband and Wife, Sec. 51; *Rose* v. *Rose*, 34 O. App. 89 (1929); *Hays* v. *Lindquist*, 22 O. App. 58 (1926); *Franceschi* v. *Franceschi*, 326 Ill. App. 494 (1945).

III. The Federal Question If Presented for Consideration, Lacks Merit, Is Unsubstantial and Not Debatable. The Fraud Alleged Is Intrinsic and the Decree May Not Be Attacked for Intrinsic Fraud.

United States v. *Throckmorton*, 98 U. S. 61 (1878); *Sistare* v. *Sistare*, 218 U. S. 1 (1910); *Williams* v. *North Carolina*, 317 U. S. 287 (1942); *Williams* v. *North Carolina*, 324 U. S. 226, 229 (1945); *Sherrer* v. *Sherrer*, 334 U. S. 343 (1948); *Coe* v. *Coe*, 334 U. S. 378 (1948); *Johnson* v. *Muelberger*, 340 U. S. 581 (1951); *Durham* v. *New Amsterdam Cas. Co.*, 208 F. (2d) 342 (C. A. 4th, 1953). See, also, *Adler* v. *Adler*, 373 Ill. 361 (1940); *Forrest* v. *Fey*, 218 Ill. 165 (1905); *Steffens* v. *Steffens*, 408 Ill. 150 (1951); *Barnard* v. *Michael*, 392 Ill. 130 (1945); *State* v. *Brewer*, 155 O. S. 203, 205 (1951); *Michael* v. *American National Bank*, 84 O. S. 370 (1911); *Rehill* v. *Rehill*, 306 N. Y. 126 (1953); *Nichols* v. *Nichols*, 306 N. Y. 490 (1954); *Schacht* v. *Schacht*, 295 N. Y. 439 (1946); *Sheard* v. *Green*, 219 La. 199 (1951); *Wallinan* v. *Hughes*, 196 Va. 117 (1954).

A consent decree embodying an agreement relating to alimony and all property rights of spouses, particularly where, as here, there is no reservation of jurisdiction over the parties in it, is just as final, binding and conclusive as a decree resulting after contest of such matters. *Lawlor* v. *National Screen Service Corporation*, 349 U. S. 322;

75 S. Ct. 865, 868 (1955), affirming 211 F. (2d) 934 (C. A. 3, 1954); *Sponseller* v. *Sponseller*, 110 O. S. 395 (1924).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
Attorneys for Respondent.

PAXTON & SEASONGOOD,
Of Counsel.

No. 223. BLOCK *v.* BLOCK. On petition for writ of certiorari to the Supreme Court of Ohio. *Per Curiam:* The petition for writ of certiorari is granted; the judgment is vacated, and the cause is remanded to the Supreme Court of Ohio for clarification as to whether its decision rests on state or federal grounds. See *Halvey* v. *Halvey*, 330 U. S. 610. *Henry B. Street* and *Philip R. Toomin* for petitioner. *Murray Seasongood* and *Robert P. Goldman* for respondent. Reported below: 163 Ohio St. 230, 126 N. E. 2d 331.